95-1438

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS F. CURRY,
Petitioner,

v.

E-SYSTEMS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does evidence from which a jury could infer pretext, where the plaintiff has made a *prima facie* case of discrimination under the judicially-created proof scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.E.2d 68, 93 S.Ct. 1817 (1973), preclude summary judgment for the defendant, consistent with *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742 (1993).

PARTIES TO THE PROCEEDING

The names of all of the parties to this proceeding appear in the caption of the case.

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OPINIONS DELIVERED IN THE CASE

The Opinion of the Court of Appeals is unreported, save as a table case. *Curry v. E-Systems, Inc.*, 72 F.3d 126 (4th Cir. 1995). The opinion is reported unofficially on the LEXIS system, at 1995 U.S.App.LEXIS 34724 (4th Cir. Dec. 11, 1995).

The Memorandum Opinion of the district court is not reported. *Curry v. E-Systems, Inc.*, C.A. No. 93-1519-A (E.D. Va. June 13, 1994).

STATEMENT OF JURISDICTION IN THIS COURT

The opinion of the Court of Appeals in this matter was issued on December 11, 1995. No petition for rehearing, or motion for an extension of time for filing a Petition for Certiorari, has been filed.

This Court has jurisdiction to consider this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1). The Order of the district court granting summary judgment was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

STATUTES INVOLVED IN THE CASE

This Petition involves the proper interpretation of the Age Discrimination In Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*, and in particular of Section 3(a)(1) of that Act, which provides:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 632(a)(1).

STATEMENT OF THE CASE

This civil action was brought by plaintiff Dr. Thomas F. Curry ("Dr. Curry") against his employer, E-Systems, Inc. ("E-Systems"), under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 *et seq.* (the "ADEA").[1] The district court had jurisdiction of Dr. Curry's claims under the ADEA in the first instance pursuant to 29 U.S.C. § 626(c)(1), 28 U.S.C. § 1343, and 28 U.S.C. § 1331.

Dr. Curry is 69 years old. At the time of his termination in 1993, he was the oldest employee in E-Systems' Center for Advanced Planning and Analysis ("CAPA"). Prior to working for E-Systems, Dr. Curry had served as Associate Deputy Assistant Secretary of the Navy for Command, Control, and Communications. Dr. Curry was hired by E-Systems as Chief Scientist of CAPA, and

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[1] A separate claim of common-law wrongful termination was asserted, but is not the subject of this Petition.

served in that capacity for ten years. Although his work performance was uniformly excellent, he was abruptly fired in 1993 during what E-Systems characterizes as a reduction in force. The only other CAPA employee to be fired in connection with this "downsizing" was Sam Hubbard ("Hubbard"), the second-oldest CAPA employee. Mr. Hubbard was fired at the same time for the same professed reason. The six remaining CAPA employees, each younger than either of the two terminated employees, ranged in age from 46 to 60.

At the time he was fired, Dr. Curry's supervisor informed him that a decision had been made by corporate headquarters that CAPA's "focus" should change, and that accordingly there was no interest on the part of E-Systems in any of the projects Dr. Curry was pursuing. However, E-Systems continued work on a number of Dr. Curry's projects after his termination. Moreover, record evidence shows Dr. Curry was the best-suited employee at CAPA for CAPA's "changed" role.

When Dr. Curry called E-Systems' corporate headquarters to discuss the reason for his termination with the Chief Executive Officer of the company, he was told—in colorful language—that the reason he was given for his termination was false. In a separate discussion with a corporate director, Dr. Curry was also told, in effect, that he was old enough to retire and that he should "hang it up."

After the close of discovery, the United States District Court for the Eastern District of Virginia, Alexandria Division, Hon. Claude M. Hilton presiding, granted summary judgment in favor of E-Systems and against Dr. Curry.[2]

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[2] The Memorandum Opinion of the district court, issued on June 13, 1994 after the filing of the Notice of Appeal, is reproduced in its entirety in the Appendix.

The district court granted summary judgment to E-Systems because Dr. Curry was not replaced by someone under the age of forty, and because "all members of the residual work force were over 40 and therefore within the protected class." Memorandum Opinion at 5. Although E-Systems also moved for summary judgment on the issue of pretext, claiming that it had a legitimate business justification for terminating Dr. Curry, Judge Hilton did not address that issue.

The Court of Appeals affirmed the decision of the district court, but did so on grounds not discussed or relied on by the district court. Rather, the Court of Appeals assumed that Dr. Curry made out a *prima facie* case under the *McDonnell Douglas* proof scheme,[3] and found that Dr. Curry did not produce sufficient evidence "to support findings of fact *both* that E-Systems' proffered reason for his discharge was false and that the real reason was intentional age-discrimination." Opinion at 11-12 (emphasis added). In so doing, the Court of Appeals held that a *prima facie* case, combined with evidence to pretext, was *not* sufficient to preclude a grant of summary judgment under *St. Mary's Honor Center v. Hicks,* —— U.S. ——, 113 S.Ct. 2742 (1993). Opinion at 7 n.3.

Dr. Cury argues, consistent with this Court's decision in *Hicks, supra,* that the existence of a *prima facie* case of discrimination (which was assumed by the Court of Appeals), combined with evidence sufficient to create an inference that the professed reason for his termination was false, is sufficient to create a jury issue on Dr. Curry's ADEA claim. This view is consistent with *Hicks* as in-

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[3] The Court of Appeals declined to address the issue of whether residual employees were "inside" versus "outside" the protected age class, because the "validity of [the Fourth Circuit's] rule" in that regard is pending before this Court in *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 546 (4th Cir. 1995), *cert. granted,* 64 U.S.L.W. 3342-43 (U.S. Nov. 14, 1995). Opinion at 6. Oral argument has recently been heard in *O'Connor.*

terpreted by other Circuits, but has been rejected by the Fourth Circuit in Dr. Curry's case.

REASON FOR GRANTING THE WRIT

THE LOWER COURT ERRONEOUSLY CONCLUDED THAT PROOF OF PRETEXT, WHERE THE PLAINTIFF HAS SUCCESSFULLY PRESENTED A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION UNDER THE *McDONNELL DOUGLAS* PARADIGM, DOES NOT PRECLUDE SUMMARY JUDGMENT UNDER *ST. MARY'S HONOR CENTER v. HICKS*

The Circuits are clearly split on the issue of whether summary judgment is precluded, under *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742 (1993), where the plaintiff has successfully made a *prima facie* case of employment discrimination and has presented proof of pretext. It would be appropriate for this Court to grant the Petition for Certiorari to resolve the conflict on this important issue between the Courts of Appeals. S. Ct. Rule 10.1(a).

Although the district court did not address the issue, the Court of Appeals held that summary judgment for E-Systems was appropriate because "the record fails to present a genuine issue as to whether E-Systems' asserted reason for Curry's discharge was a pretext for age-discrimination." Opinion at 6. Given the fact that Dr. Curry made out a *prima facie* case of discrimination, and presented evidence of pretext, the Court of Appeals' ruling was error.

The record contains sufficient evidence to permit a finder of fact to conclude that E-Systems' proffered explanation for firing Dr. Curry is false. E-Systems claims that Dr. Curry was fired because there was no interest at E-Systems in continuing any of the work he was performing; and that the focus of CAPA was changing to emphasize marketing and sales. Because Dr. Curry proffered a *prima facie* case, and because there is ample evidence

in the record from which a reasonable jury could conclude this explanation is false, this Court's decision in *Hicks* permits a jury to infer that discrimination was the real reason for the discharged and precludes the grant of summary judgment.

It would be hard to imagine more direct evidence of pretext than exists in this case. Dr. Curry was told he was being fired because of a company-wide change in focus. The chief executive officer of the company stated that this explanation for the termination was flatly wrong; and a member of the Executive Committee of the Board of Directors, referencing Dr. Curry's age, stated "Damn, Tom . . . it's time to hang it up." Curry Dep., J.A. at 188. This evidence is probative. It is admissible.[4] It is pithy. And it is evidence from which a jury could infer that the company's "proffered" explanation is precisely what the company's chief executive officer called it.[5] If this is not evidence which can *permit* (although not *compel*) a finding of pretext, nothing is.

The characterization of the company's reasoning by its Chairman is also supported by independent evidence in the record. For example:

- Only the two oldest CAPA employees were terminated, the younger employees were all retained;[6]
- CAPA's focus did not change after Dr. Curry was fired;[7]

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[4] *See* Fed. R. Evid. 801(d).

[5] The Court of Appeals characterized the chief executive officer's response to the reason given by the company as, "Bull - - - -!"

[6] At the time of termination, Dr. Curry was the oldest member of the CAPA technical staff. The second-oldest member of the technical staff, Mr. Hubbard, was also fired at the same time for the same professed reason.

[7] DiPalma Dep., J.A. at 280-81.

- Dr. Curry's marketing expertise was well-suited to the new focus CAPA claims to have adopted; [8]
- CAPA continued work on Dr. Curry's projects after he was fired; [9]
- E-Systems refused to retain Dr. Curry as an unpaid consultant.[10]

This is precisely the issue which so concerned the four dissenting members of this Court in *St. Mary's Honor*

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[8] Within the context of CAPA's group charter, strategic market planning, or technical and business analysis of market trends as related to E-Systems' capabilities and stated goals, Dr. Curry had the best track record of anyone of the staff. Plaintiff's Responses to Defendant's Interrogatories, J.A. at 164-65. Moreover, George Steeg, an independent consultant who worked closely with Dr. Curry and who was intimately familiar with CAPA, testified that Dr. Curry is "very good at working technical things around to where they look attractive from the marketing standpoint," Steeg Dep., J.A. at 330.

[9] One example is the fact that Dr. Curry's work on the "Constellation" project for E-Systems is "ongoing," Butz Dep., J.A. at 340, and continues at E-Systems. Curry Dep., J.A. at 55, 62; Mitchell Dep., J.A. at 286; Uffelman Dep., J.A. at 205; Dickinson Dep., J.A. at 290. Another examle is E-Systems' continued work, in which Dr. Curry was intimately involved, respecting Global Positioning Systems ("GPS"). J.A. at 369, 376, 383; Curry Dep., J.A. at 184. Dr. Curry was working on the GPS project with Sam Hubbard, the second-oldest CAPA technical staff member and the only other one to be fired in 1993. *See* J.A. at 390. Dr. Curry testified that the GPS project continued after he left CAPA. Curry Dep., J.A. at 186. Indeed, retained CAPA technical staff member James Mitchell ("Mitchell") testified that E-Systems continues to pursue the project. Mitchell Dep., J.A. at 285; *see also* J.A. at 394-98.

[10] Although E-Systems' professed termination of Dr. Curry as part of a money-saving consolidation, it makes no sense in light of E-Systems' refusal to permit Dr. Curry to continue his association with the company as an *unpaid* consultant. *See* Plaintiff's Response to Defendant's Interrogatories, J.A. at 167. E-Systems has entered into such an arrangement on a number of occasions with other former employees, Curry Dep., J.A. at 191, but not with Dr. Curry.

Center v. Hicks, —— U.S. ——, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), where Justice Souter warned of "summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence." 113 S.Ct. at 2763. The lower courts in this case simply misconceived the quantum of evidence sufficient to permit this case to be tried to a jury.

In *Hicks*, this Court held that a Title VII plaintiff is not *entitled* to judgment as a matter of law *merely* by proving a defendant's proffered explanation is pretextual. However, this Court was careful to note that evidence of pretext *may* also provide evidence from which a finder of fact *is permitted to* infer discriminatory intent:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. *Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals* [*below*] *was correct when it noted that, upon such rejection, 'no additional proof of discrimination is required.'*

113 S.Ct. at 2749 (emphasis added).

This Court's language seems crystal clear. In cases where the plaintiff has established a *prima facie* case and has further presented evidence of pretext, summary judgment is precluded and the trier of fact must determine whether the ultimate fact of intentional discrimination may be inferred. However, the Circuits are badly divided on the issue.

The Fourth Circuit stands with a minority of Circuits which incorrectly hold that under *Hicks* a plaintiff will not necessarily survive summary judgment, or judgment as a matter of law, simply because a *prima facie* case

exists and the evidence is sufficient to permit a rational factfinder to disbelieve the employer's proffered reasons. *See Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 39 (1st Cir. 1995); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 843 (1st Cir. 1993), *cert. denied*, 128 L.Ed.2d 72, 114 S. Ct. 1398 (1994); *Rhodes v. Guiberson Oil Tools*, —— F.3d ——, 1996 U.S. App. LEXIS 1464 *9, 69 Fair Empl. Prac. Cas. (BNA) 1720 (5th Cir. Jan. 31, 1996); *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620 (8th Cir. 1995); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994).

However, the majority of Circuits correctly recognize that summary judgment, or judgment as a matter of law, is precluded if, in addition to the *prima facie* case, the plaintiff presents evidence of pretext. *See Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995); *DeMarco v. Holy Cross High School*, 4 F.3d 166, 170 (2d Cir. 1993); *Sheridan v. E. I. DuPont de Nemours and Comp.*, 1996 U.S. App. LEXIS 1237 *19-20, 69 Fair Empl. Prac. Cas. (BNA) 1705 (3d Cir. Jan. 31, 1996); *Perdomo v. Browner*, 67 F.3d 140, 145 (7th Cir. 1995); *Collier v. The Budd Comp.*, 66 F.3d 886, 893 n.11 (7th Cir. 1995); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995); *Howard v. BP Oil Comp., Inc.*, 32 F.3d 520, 526 (11th Cir. 1994); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. granted*, 64 U.S.L.W. 3068 (U.S. Jan. 19, 1996).

This Court should issue a writ of *certiorari* in this case to resolve this conflict among the Circuit Courts of Appeals.

CONCLUSION

Petitioner Thomas Curry respectfully requests that his Petition be granted, and that a writ of *certiorari* issue in this cause.

Respectfully submitted,

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March 8, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 94-1779

THOMAS F. CURRY,
Plaintiff-Appellant,

v.

E-SYSTEMS, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Claude M. Hilton, District Judge
(CA-93-1519-A)

Argued: December 6, 1994

Decided: December 11, 1995

Before WILKINSON, Circuit Judge, PHILLIPS, Senior Circuit Judge, and LAY, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION

PER CURIAM:

Thomas F. Curry appeals from a grant of summary judgment dismissing his action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* We affirm.

I.

E-Systems, Incorporated (E-Systems) is involved in the international development and manufacture of electronic systems and products. A significant portion of the corporation's business is generated from defense-related government contracts. In 1983 E-Systems hired Curry to serve as Chief Scientist of its Center for Advanced Planning and Analysis (CAPA), a position created specifically for him.

E-Systems began laying off personnel in the summer of 1990, and at that time some CAPA personnel were transferred and others were discharged. In the spring of 1993, E-Systems implemented a second lay-off, which again involved CAPA technical personnel, this time including Curry, who was discharged on May 26, 1993. At the time of his discharge, Curry was the oldest employee on CAPA's then remaining technical staff of eight. The second oldest member of the staff, aged sixty-three, was also discharged. All of the six members retained at that time were over the age of forty-five: Phillip Dickinson (60), James Mitchell (60), Robert DiPalma (57), Malcolm Uffelman (57), William Butz (54), and Thomas Milbourne (46).

Soon after his discharge, Curry complained about it to two persons at E-Systems' headquarters, neither of whom was involved in the decision to discharge him. When Curry told one of them, E-Systems' Chairman of the Board, that he had been fired because no one was interested in his projects, the Chairman answered. "That's bull——." When Curry told the other, a member of E-Systems' Executive Board of Directors about his termination, the Director asked Curry, "How old are you?" When Curry responded with his age, the Director stated, "Damn, Tom . . . it's time to hang it up."

In November, 1993, Curry filed this action, alleging age discrimination in violation of the ADEA and wrong-

ful termination under state law.[1] During discovery, Curry's immediate supervisor, Malcolm Uffelman, testified in deposition that at the time of the two reductions in force involving CAPA members, E-Systems was changing its focus from long-term government-funded "research work" toward more short-term "business capture." As a result, Uffelman deposed, E-Systems had no interest in continuing to pursue the highly sophisticated technical projects on which Curry was working. He cited a lack of healthy funding from the Department of Defense as reason for the change.

Another member of E-Systems' upper-level management, William McClain, aged fifty-nine, cited this same rationale for Curry's discharge during his deposition. He deposed that the reduction in personnel became necessary after the corporation's decision to merge CAPA into a larger division of the company called Government and International Operations (GIO). This merger occurred in May 1993, the month of Curry's discharge. After the reorganization, CAPA became known as the Studies and Analysis component of E-Systems. McClain, the Vice President of GIO, testifying on deposition, took partial responsibility for the decision to terminate Curry, but deposed that the ultimate decision had been made by the Vice President of E-Systems, Eaton Adams, aged sixty-three, who died before this action was commenced. McClain deposed that Adams agreed with the reasoning for Curry's discharge that both he and Uffelman had cited.

Upon the closing of discovery, E-Systems moved for summary judgment and attached an affidavit of McClain which stated that E-Systems' Studies and Analysis section

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[1] The district court dismissed the state-law wrongful termination claim without prejudice for lack of jurisdiction. Curry subsequently refiled the claim in state court. E-Systems then removed the claim to federal court pursuant to 28 U.S.C. § 1446 and the parties agreed to a Consent Order staying proceedings on that claim pending resolution of this appeal.

would be disbanded in a matter of weeks. The affidavit did not state whether any further reductions would be necessary as a result of the merger. In opposing the motion, Curry argued that his summary judgment submissions both sufficed to establish a prima facie case of discrimination and to demonstrate a genuine issue as to whether E-Systems' proffered reasons for his termination were pretextual. The district court granted E-Systems' motion on alternative grounds. First, assessing the claim under the *McDonnell-Douglas* three-step proof scheme, the court held that Curry's submissions failed to establish a prima facie case and in any event, failed to raise a genuine issue as to whether E-Systems' proffered reason for his discharge was pretextual. Then, assessing the claim for direct proof of age-discrimination, the court held that there was insufficient direct evidence to support a finding of age-bias as the cause of Curry's discharge. J.A. 455-59.

This appeal followed.

II.

In order to prevail on an ADEA claim, a plaintiff must show that the employer would not have taken the adverse employment action at issue "but for" the employee's age. *Sailor v. Hubbell, Inc.*, 4 F.3d 323, 326 (4th Cir. 1993) (citing *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 847 (4th Cir. 1988)). A plaintiff can do so by offering direct evidence of the requisite discriminatory motive, *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1417 (4th Cir. 1991) or, alternatively, by successfully proceeding under the familiar three-step proof scheme developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for Title VII actions as transposed for application in ADEA cases. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238-39 (4th Cir. 1982). Under that scheme, once the plaintiff establishes a prima facie case, a presumption of discrimination arises and the burden of production is placed on the employer to articulate a

legitimate nondiscriminatory reason for the challenged employment decision at peril of suffering an adverse judgment if he fails. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2727 (1993) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). If the employer carries this burden, the presumption of discrimination "drops out of the picture" and the plaintiff bears the ultimate burden of proving both that the employer's asserted reason was pretextual and that the challenged employment action was actually taken because of the claimant's age. *Id.* at 2749.

Though this proof scheme was originally developed as "merely a sensible orderly way to evaluate the evidence" adduced in a bench trial, *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978), it may properly be applied, as appropriately adapted, to summary judgment rulings. In this circuit, as in others, this regularly has been done in ADEA cases. *See, e.g., E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992); *Mitchell v. Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993); *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542 (4th Cir. 1995). In that setting, assessment, as dictated by the grounds of the motion, proceeds in the sequential order of the proof scheme. Thus, where an employer-defendant as movant has contended both that the claimant's submissions fail to establish a prima facie case or, alternatively, to present a genuine issue as to the credence of an asserted non-discriminatory reason, our practice (at both levels) has been to address these in order as separate inquiries.[2] *See Clay*, 955 F.2d at 943-44 (no prima facie

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[2] *Cf. U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711 (1982), noting that once an employment discrimination action has proceeded through bench trial to conclusion without having been dismissed for lack of a prima facie case, the question whether a prima facie case under the *McDonnell-Douglas* proof scheme was properly made out "is no longer relevant." Because at this point the district court has before it all the evidence needed to decide the discrimination issue *vel non*, it should proceed directly to that

case; no genuine issue as to pretext); *Mitchell*, 12 F.3d at 1316-18 (same); *O'Connor*, 56 F.3d at 546-48 (no prima facie case; alternative ground not reached).

This, as indicated, was the procedure followed in the district court. There, E-Systems urged in support of its summary judgment motion both grounds in the alternative and the district court ruled in its favor on both, as well as ruling that Curry had made no proffer of direct evidence of-age-bias sufficient to present a genuine issue for trial. The basis for the district court's prima facie case ruling was the failure of Curry's evidence to show, as our decisions require, that any of the CAPA employees retained when he was discharged was "outside the protected age class." *See EEOC v. Western Electric*, 713 F.2d 1011, 1015 (4th Cir. 1983); *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1418 (4th Cir. 1991). Before us, the parties join issue principally upon the correctness of this ruling as a basis for dismissing the claim. We do not address it, however, because in the interval the Supreme Court has granted certiorari to consider the validity of our rule, *see O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 546 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3342-43 (U.S., Nov. 14, 1995); and because the grant of summary judgment may be affirmed, as E-Systems argues, on the alternative basis that in any event the record fails to present a genuine issue as to whether E-Systems' asserted reason for Curry's discharge was a pretext for age-discrimination.

Assuming then, as we will for purposes of this case, that Curry's summary judgment submission may have made out a prima facie case, the next question presented

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question. *Id.* at 715. The difference of course is that the question on summary judgment is not whether on all the evidence the claim has been established on the merits, but whether there is a submissible issue of material fact for trial. To answer that, the first logical inquiry is whether the plaintiffs' proffered evidence would make out a prima facie case, hence survive a motion to dismiss, before ever getting to any possible "pretext" issues.

is whether E-S[illegible]ems produced admissible evidence of a legitimate, non-discriminatory reason for his discharge. Curry argues that it did not. He does not say that the reason advanced—management's decision to phase the CAPA group's functions out for economic reasons—was not, if true, a legitimate, non-discriminatory one. His argument is only that the evidence proffered to establish this reason was inadmissible, therefore insufficient even to carry this modest production burden. Specifically, he contends that the deposition testimony relied upon to advance this as the reason was that of two people in management, Uffelman and McClain, who ascribed it to a third person in management, Eaton Adams, on the basis of out-of-court statements made to them by Adams, since deceased. This evidence, Curry contends, would be inadmissible at trial, hence was insufficient for summary judgment purposes, both under Fed. R. Evid. 602 (lack of personal knowledge) and Fed. R. Evid. 802 (hearsay).

We disagree. The evidence would not be inadmissible on either ground. In the first place, McClain's testimony indicated that he participated in the decision to discharge Curry, having recommended it with knowledge of the reason why the downsizing was being implemented. His testimony could not, therefore, have been without personal knowledge of the reason, even assuming, *arguendo*, that personal participation in devising the reason was necessary to "personal knowledge" of it. Furthermore, the deposition testimony as to Adams' statements of his reason were not offered to prove the truth, the correctness of the reason, only that this was the reason. As such, the testimony was not inadmissible as hearsay. *See Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1423 (10th Cir. 1991) (documentary evidence of employer's out-of-court statements of reasons for reduction-in-force not hearsay because not offered to prove truth of contents, but motivation).

This leads to the final question presented, whether Curry's forecast of evidence sufficed, considered as a

whole, to present genuine issues of fact both as to whether E-Systems' proffered reason was false *and* whether the real reason was discrimination because of Curry's age. *See Hicks*, 113 S. Ct. at 2752 (burden, once legitimate non-discriminatory reason is proffered, is to prove both, *i.e.* that proffered reason was pretextual and that pretext was "for discrimination").

Curry contends that his forecast of evidence does so suffice, relying on several specific items: (1) that all the CAPA staff members retained when he was discharged were younger than he; (2) the remarks of two E-Systems management people when told of the purported reason for Curry's discharge; (3) that CAPA's focus did not in fact change after Curry's discharge; (4) that Curry's expertise was well-suited to the asserted new focus; (5) that CAPA continued work on Curry's project after he was discharged; and (6) that E-Systems refused to keep him on as an unpaid consultant.[3]

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[3] Curry's actual argument in reliance on these items of evidence is a confused one partially based on the mistaken premise that, under *Hicks*, evidence of pretext can suffice, standing alone, to raise a submissible issue of age-discrimination, hence to preclude summary judgment. Appellant's Br. 28-32. *Hicks* holds the exact opposite: that proof of pretext alone will not suffice to support a finding of age discrimination, though coupled with proof of the prima facie case, it *may*. *Hicks*, 113 S. Ct. at 2749. Proceeding on his mistaken contrary premise. Curry relies specifically on items (3)-(6) as sufficiently suggesting the falsity of E-Systems' proffered reason, hence as sufficiently raising a genuine issue of discrimination in his discharge. Appellant's Br. at 32-39. Elsewhere in his argument, however, in the course of urging the sufficiency of his evidence to make out a prima facie case, he identifies items (1) and (2) as sufficient "other evidence" that age-discrimination was the real reason for his discharge. *Id.* at 24-25. Because on a proper analysis of the sufficiency of Curry's evidence to raise genuine issues both as to the proffered reason's falsity and as to age-discrimination as the real reason, these items of evidence should have been considered together for that purpose, we do so here on *de novo* review.

In considering whether this evidence does suffice to put the clearly material facts of "pretext" and "pretext for age-discrimination" in issue and hence to preclude summary judgment, we must ask whether it raises "genuine" issues. "[M]erely colorable" evidence, evidence that is "not significantly probative," though clearly relevant to the issues, will not suffice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The standard we apply, paralleling that for judgment as a matter of law at trial, is whether there is evidence that would permit a jury rationally to find, the burden of persuasion being on Curry, that E-Systems' asserted reason was a false one and that age-discrimination was the real reason for Curry's discharge. *See id.* at 250-52.

Assessed under that standard, we conclude that the evidence as forecast on the summary judgment record did not suffice, considered as a whole, to create genuine issues as to these material facts.

Curry's principal reliance is on the differentials between his age and those of the CAPA staff members who were retained just after his discharge.[4] Of the eight CAPA staff members employed just before Curry was discharged, he was the oldest at age-66. The next oldest, then age-63, was also discharged. That may seem significantly probative of age as the real criterion for discharge being employed until the number and ages of those retained at the time are considered. Of the six retained, none was below 45; only one, at age 47, was below 50; two were 60, one 57, and one 54. There is no evidence, and

[4] The actual focus of Curry's reliance on the age-differential evidence is as proof of the prima facie case. Appellant's Br. 11-24. Having assumed for purposes of this case that the prima facie case was established, we can—and should in fairness—consider this age-differential evidence for its possible relevance to the end-stage "pretext" issues. *See Hicks*, 113 S. Ct. at 2749 (in determining whether claimant has proved employer's asserted reason a pretext for intentional discrimination, court considers all evidence, whether advanced to establish prima facie case or to prove "pretext").

Curry never has claimed, that the whole reduction-in-force process was a disguised youth movement of which he was simply one victim. His claim is more narrowly that he is the victim of a relative-age criterion that was used to discriminate between individuals in a small group consisting entirely of employees all of whom were well on the high-side of the normal life expectancy range. That is certainly a cognizable theory of age-discrimination in such a situation, the differentials between the ages of the claimant and the retained group as a whole must be substantial and the employee-group of a sufficient size to provide a fair basis for drawing any inference from relative ages. Not just any age-differential, no matter how slight and involving no matter how small a group of employees can be considered significantly probative that age was the criterion driving choices between employees. The ADEA is an anti-age-discrimination statute, not an age-preference statute. To accord any significant weight to relatively small age differentials between relatively small groups of employees would be effectively to treat it as the latter. *See Western Electric*, 713 F.2d at 1016 (age-discrimination not inferable where demoted employees "were very close in age to most of the younger supervisors who were not demoted"); *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1467 n.13 (6th Cir. 1990) (if, hypothetically, most retained employees were only a year younger than discharged claimant, evidence "likely not . . . probative" of age-discrimination).

We need not—could not—lay down bright line rules for the requisite age-spread and group-sample size to be accorded any weight as proof of age-discrimination. We are satisfied, however, that they do not suffice here where a 66-year old claimant has been discharged along with one other 63-year old employee out of a group of only eight employees, with none of the six retained being younger than 47, four of the six being 57 or older, and the two oldest, 60. This age spread, in a group this small, is not sufficiently probative of intentional age-discrimination to

be accorded significant weight in the summary judgment assessment. *Cf. Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir. 1994) (emphasizing statistical insignificance of age-differential evidence involving only relatively small number of employees discharged during reduction-in-force process).

The other evidence relied upon is equally insufficient to create genuine issues respecting these material facts. They warrant less discussion.

The remarks of the two superiors to whom Curry reported the age-neutral reason given for his discharge—one suggesting doubt about the validity of the reason, the other implying possible agreement that Curry's age was an appropriate consideration—are entitled to no weight. Neither of these persons was involved in the corporate decision to discharge Curry, nor is there any suggestion that either had been told of their reason by those who did make the decision. Remarks of outsiders to the decisional process that reflect only their personal beliefs and opinions are not relevant to the issue of the decisionmakers' motive. *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980) ("It is the perception of the decisionmaker which is relevant"); *see also, Birkbeck*, 30 F.3d at 511-12 (noting insufficiency of "isolated" comments, even those of decisionmakers, to support finding of discrimination).

The remainder of the evidence relied upon is designed, in various ways, to draw in question the truth of E-Sytems' assertion that Curry was discharged only because the functions of the CAPA staff of which he was the chief scientist were being phased out as part of an economically-forced redirection of E-Systems' operations, and that his specific skills were deemed by management not to be as compatible with the company's re-focused operations as were those of others. First, he points to evidence which he says suggests that CAPA's focus did not in fact change after his discharge; that work on its and his projects were simply

continued by others. The evidence he relies upon simply raises no genuine issues respecting these facts, assuming they were material to the issues of pretext in the proffered reason. In the first place, Curry has not disputed E-Systems' affidavit that what remained of CAPA after its merger with GIO was now being disbanded, so that his particular employment group would no longer exist as an entity. More significantly, Curry's evidence of continued work on his and CAPA's projects by other individuals and entities reflects no more than the inevitable carry-through to completion of some few projects, a fact candidly conceded by E-Systems. Curry offered no evidence that there was not, as E-Systems asserted, a fairly immediate phasing out of those functions formerly assigned to CAPA and his staff. By his own deposition testimony, Curry conceded that in the last six months before his discharge between twenty and twenty-five percent of his working time was spent on a later-cancelled environmental project, twenty percent on a later-cancelled project for the National Security Agency, and another twenty percent reading technical journals. And he acknowledged that several smaller projects—accounting for another five percent of his time —were either completed or relatively unsuccessful. This evidence would not support a finding that after his discharge, his work continued to be carried on by others.

Curry's evidence designed to suggest that if a change in business focus of the type asserted by E-Systems were to be made, he was better qualified to direct the new efforts than were those retained is of no weight on the pretext issues. This evidence rests entirely on his own self-serving appraisals which under our decisions disentitles it to consideration on the issue of employment discrimination. *See Flax*, 618 F.2d at 1067 ("not relevant" to issue of employer motivation). And, to the extent the appraisal, even if true, suggested simply poor business judgment on E-Systems' part, that of course is not actionable as employ-

ment discrimination. *See Holder v. City of Raleigh*, 867 F.2d 823, 829 (4th Cir. 1989).

Finally, Curry's contention that E-Systems' refusal to hire him as an "unpaid consultant" somehow is probative of age-discrimination eludes us. Apparently, the suggestion is that nothing but age-bias could account for E-Systems' refusal to take his work even on a gratis basis. A more plausible assessment, as E-Systems points out, would be that his work was no longer needed, even for free, precisely as the company has contendd.

III.

Because we conclude that even assuming Curry has made out a prima facie case under the *McDonnell-Douglas* proof scheme, his forecast of evidence was not sufficient to support findings of fact both that E-Systems' proffered reason for his discharge was false and that the real reason was intentional age-discrimination, we affirm the district court's grant of summary judgment to E-Systems.

SO ORDERED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action Number 93-1519-A

THOMAS F. CURRY,

Plaintiff,

v.

E-SYSTEMS, INC.,

Defendant.

MEMORANDUM OPINION

This case came before the Court on the Defendant's Motion for Summary Judgment. Plaintiff Thomas F. Curry ("Curry") claims that the defendant E-Systems, Inc. ("E-Systems") discriminated against him on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), the Constitution of the Commonwealth of Virginia, the Virginia Human Rights Act, and the Fairfax County Human Rights Ordinance. Jurisdiction is proper for the ADEA claim pursuant to 28 U.S.C. §§ 1331 and 1343(a) and 29 U.S.C. § 626(c)(1). Jurisdiction is proper for the state claims under 28 U.S.C. § 1332(a)(1).

Cury, who was 67 years old at the time the Complaint was filed, was Chief Scientist for E-Systems' Center for Advanced Planning and Analysis ("CAPA"). He claims that he was laid off because of his age. That on several occasions CAPA officials characterized him as "too old" to understand the modern telecommunications market; he

also claims that staff members referred to him as "the old man." The Vice President and General Manager of CAPA, Malcolm Uffelman, complained that Curry was losing his hearing, although Curry alleges that he experienced no perceptible change in his hearing ability.

On May 26, 1993, Curry was informed by Uffelman that he would be laid off due to lack of work, effective June 9, 1993. Another scientist, Sam Hubbard, 60, was laid off at the same time. Although Curry claims that the lay-off was based on his age, the company argues that it was the result of corporate restructuring designed to mitigate its losses in the face of declining expenditures by the Department of Defense.

The company merged CAPA into the Government and International Operations Division ("GIO"), and determined that the GIO should concentrate on new business development. What had been CAPA was refocused away from detailed technical studies and technical analysis.

E-Systems asserts that Curry was terminated because he had been principally involved in non-critical, highly technical work, which was no longer to be pursued by GIO. At his deposition, Curry admitted that his principal focus at CAPA was sophisticated technical analysis relating to reconnaissance, surveillance and intelligence collection. McClain testified in deposition that this was the sort of technical work that would not thereafter be focused upon at GIO.

William McClain, the Vice President of GIO, organized the merger and, along with Eaton Adams, the company's Vice President of Strategic Planning, decided to lay off Curry and Hubbard. At the time, CAPA's staff had eight professionals: Will Butz, (54) Thomas Cury (66), Phil Dickinson (60), Robert DiPalma (57), Sam Hubbard (63), Tom Milbourne (46), Jimmie Mitchell (61) and M. L. Uffelman (57).

Grants of summary judgment motions are warranted if the pleadings, answers to interrogatories, admissions and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The substantive law determines materiality. That is, only those facts that might be outcome-determinative under the current law are material. A "genuine" issue of material fact is present "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To prevail on a claim the E-Systems discriminated against him in violation of the ADEA, Curry must prove that age was a "determining factor" in the decision to terminate him. *See, e.g., Tuck v. Henkel, Corp.*, 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1276 (1993). In other words, he must show that but for E-Systems' alleged motive to discriminate against him because of his age, Curry "would not have suffered the action." *Id.*

There are two ways Curry may meet his burden of proving discriminatory intent. Under the scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), once he proves all of the elements of a prima facia case of discrimination, the burden shifts to the defendant to articulate a legitimate non-discriminatory explanation. *See Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1314-15 (4th Cir. 1993); *Fink v. Western Elec. Co.*, 708 F.2d 909 (4th Cir. 1983) (adopting *McDonnell Douglas* scheme for use in ADEA cases). Once the defendant articulates a non-discriminatory explanation, the presumption of discrimination created by the prima facia case "drops from the case," and the plaintiff bears the ultimate burden to prove both that the defendant's reasons were pretextual and that the adverse employment action was the result of intentional discrimination. *See St. Mary's*

Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747 (1993); *Mitchell*, 12 F.3d at 1315.

The Fourth Circuit has set forth the elements of a prima facia case in a reduction-in-force case such as the one *sub judice*. Curry must prove that (1) he was protected by the ADEA; (2) he was selected for discharge from a larger group of candidates; (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) "the process of selection produced a residual work force of persons in the group containing some unprotected persons who were performing at a level lower than that at which he was performing." *Mitchell*, 12 F.3d at 1315.

The second way for Curry to establish a prima facia case is to present evidence of discriminatory intent and actions. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982). In order to avoid summary judgment under this paradigm, Curry would have to come forward with sufficient, probative evidence such that, if fully believed, a jury could reasonably find for him. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Curry cannot establish liability against E-Systems under the *MacDonnell Douglas* scheme. Although the first three elements of the prima facia case are not in dispute, he cannot meet the requirements of the fourth element. That is, all members of the residual work force were over 40 and therefore within the protected class. 29 U.S.C. § 631(a).

Curry is also unable to establish intentional discrimination through "direct or indirect evidence relevant to and sufficiently probative of the issue." *Lovelace v. Sherwin Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982). Importantly, there is no direct evidence that Adams or McClain acted toward the plaintiff with a discriminatory motive.

The only evidence in support of plaintiff's claim is (1) his contention that some of his co-workers made comments

about his age and an alleged hearing problem, (2) the fact that he and Hubbard were the oldest technical people at CAPA, and (3) age-related comments by E-Systems' Chairman of the Board and one of the members of the company's Executive Committee of the Board of Directors.[1] This evidence is inadequate because it is the motivations of the decisionmakers—McClain and Adams—that are relevant and probative. *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936, 943 (4th Cir. 1992) (plaintiff must establish a "nexus" between the alleged statements and the adverse employment decision). Plaintiff's deposition shows that he does not have any evidence that the management employees were motivated by discriminatory animus.

The fact that plaintiff and Hubbard were the two oldest people in the group does not make plaintiff's case. *Carter v. Westinghouse Elec. Corp.*, 703 F. Supp. 393 (W.D. Pa. 1988), *aff'd*, 877 F.2d 53 (3rd Cir. 1989) (finding age considerations were not a causal factor in termination decision where, although the plaintiff offered statistical evidence in his favor, there were economic reasons and the employer selected those employees for termination whos skills and experience were the least suited to the unit's goals). Further, all of the professionals in the group were in the protected class. Curry's evidence is weaker still in light of the fact that E-Systems recently determined that the Studies and Analysis Group at GIO (formerly CAPA) will be disbanded in its entirety.

In any event, E-Systems has presented evidence that the elimination of Curry's job was the result of a reorganiza-

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[1] Plaintiff claims that when he told the CEO, Gene Keiffer that Curry had been laid off due to lack of work, and that there was no interest in the things on which he was working, Keiffer registered suspicion. Plaintiff also claims that when first told of plaintiff's lay-off, David Tackle, a member of the Executive Committee of E-Systems' Board of Directors, first asked plaintiff his age. Upon learning that Curry was 66, plaintiff claims that Tackle stated, "[I]t's time to hang it up."

tion and merger of CAPA into GIO for cost-cutting, productivity and efficiency concerns. McClaim and Adams evaluated the technical personnel and determined that Curry would not be needed in the GIO organization. The plaintiff has not shown that the defendant's proffered reason for the lay off was merely pretextual. Summary judgment is appropriate for the ADEA claim, and there is no jurisdiction for plaintiff's claims under the Constitution of the Commonwealth of Virginia, the Virginia Human Rights Act, and the Fairfax County Humans Rights Act, and they should be dismissed with prejudice.

An appropriate Order shall issue.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia
June 13, 1994

APPENDIX C

STATUTORY PROVISIONS

The Age Discrimination in Employment Act of 1967 (ADEA)

29 U.S.C. § 621, et seq.

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely af-

fect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary

early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) [Reserved]

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement

of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated em-

ployee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requiremens of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or

instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Compliance with this chapter

A seniority system or employee benefit plan shall comply with his chapter regardless of the date of adoption of such system or plan.

(l) Exceptions

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) An employee pension benefit plan (as defined in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2))) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 3(35) of such Act) [29 U.S.C. 1002(25)] provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 US.C., 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent even unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii)

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in

section 501(c)(17) of Title 26, Internal Revenue Code) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act, or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a

rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on Oct. 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of this subsection, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power—

(a) Delegation of functions; appointment of personnel; technical assistance

To make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of his chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall atempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate

upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filling of charge with Commisison; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission un-

der this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver of rights or claims

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment ter-

mination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1) or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commissioner's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicious places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter 11 of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 20, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.]; or

(2) although not certified, is a national or international labor organization of a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communi-

cation among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees

assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employee or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymakers position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if

employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d) Tenured employee at institution of higher education

Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1141(a) of title 20).

§ 632. Annual report to Congress

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering its activities for the preceding year and including such information, data and recommendations for further legislation in connection with the matters covered by this chapter as it may find available. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendation to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

§ 633. Federal-State relationship

(a) Federal action superseding State action.

Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings.

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected.

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments

as defined in section 102 of title 5, United States Code [5 USCS § 102], in executive agencies as defined in section 105 of title 5, United States Code [5 USCS § 105] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission; compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions; bona fide occupational qualification.

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commisison shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief.

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices.

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and

eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official.

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personal action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act [29 USCS § 631(b)] and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope.

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978 [see the 1978 Amendment note to this section], and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978 [29 USCS § 631(b)].

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection.

Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this Act [29 USCS §§ 621 et seq.]

Supreme Court, U.S.
FILED
APR 9 1996
CLERK

(2)

No. 95-1438

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS F. CURRY,
Petitioner,

v.

E-SYSTEMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the unpublished per curiam decision of the court of appeals correctly applied well-settled summary judgment standards to the particular facts of this case in affirming the trial court's decision to enter judgment against the petitioner on his age discrimination claim.

STATEMENT REQUIRED BY RULE 29.6

The parent company of respondent E-Systems, Inc. is Raytheon Company. E-Mass, Inc. is a nonwholly-owned subsidiary of E-Systems, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1438

THOMAS F. CURRY,

Petitioner,

v.

E-SYSTEMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent E-Systems, Inc. ("E-Systems" or "the Company") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unpublished per curiam decision of the United States Court of Appeals for the Fourth Circuit.

This case involves nothing more than the straightforward application of this Court's settled summary judgment standards to the particular evidence adduced in the litigation. The court of appeals unanimously affirmed the district court's entry of summary judgment against petitioner Thomas F. Curry ("Curry") on his age discrimination claim, because the evidence was insufficient to permit a reasonable factfinder to conclude either that E-Systems' asserted reason for terminating Curry's employment—that changed business conditions necessitated a change in the organization's focus, and Curry's skills were not as com-

patible with the new focus as were those of other employees—was untrue, or that the real reason for the termination was Curry's age. This determination has no significance beyond the confines of this specific litigation, a fact that the court of appeals recognized when it concluded there was no need even to publish its opinion.

The case does not present any question under *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 1042 (1993), as Curry contends. He argues that under *Hicks*, he was entitled to a trial if, in addition to establishing a *prima facie* case of discrimination, he adduced sufficient evidence that E-Systems' asserted reason for discharging him was false—even absent any evidence that the real reason for the decision was his age. Pet. App. 4-6.[1] Curry clearly could not prevail even under his own proposed standard, however, because the court of appeals concluded that the evidence he proffered to cast doubt on the credibility of the Company's stated reason did not suffice to create any genuine issue for trial.

The remaining issues that Curry raises simply go to the sufficiency of the evidence and are not worthy of this Court's plenary consideration. And, in all events, the court of appeals' decision is correct. The petition should be denied.

COUNTERSTATEMENT

E-Systems develops and produces electronics systems and products. Much of its business is generated from defense-related contracts with the Federal Government. Pet. App. 2a; J.A. 47. Curry was hired in 1983 to work as a scientist in an E-Systems unit called the Center for Advanced Planning and Analysis ("CAPA"). During the 1980s CAPA functioned as a corporate "think tank," and the work of its professional staff, including Curry, was

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari. "J.A." refers to the Joint Appendix filed in the court of appeals.

highly theoretical and research oriented. Pet. App. 2a; J.A. 53, 75.

In 1990, due to changes in the defense industry, E-Systems conducted the first of several layoffs in CAPA. Some employees were transferred and others discharged. Pet. App. 2a. A second layoff occurred in 1993. At that time, CAPA had only eight professional staff members, all over age 45. Four of the eight—including Curry (age 66)—were 60 or older, and only one was younger than 54. *Id.*[2]

The 1993 layoff was prompted by the decision of Eaton Adams (age 63), E-Systems' Vice President for Strategic Planning, to merge CAPA into another segment of the Company called Government and International Operations ("GIO"). The new GIO was to focus primarily on business development, and the organization that had been CAPA, which would be called Studies and Analysis, would move away from the sophisticated technical studies that had been the unit's principal focus. *Id.* at 3a; J.A. 89-91, 93, 98.

Once the new business plan was established, the Vice President of GIO, William McClain (age 59), reviewed the work that the CAPA professionals had been doing. On that basis, he and Adams decided that Curry and Sam Hubbard (age 63) would be laid off. Curry was selected for layoff because his work primarily had been non-critical work of a highly sophisticated, technical nature—the sort of work that Adams had determined GIO would no longer emphasize. Pet. App. 3a; J.A. 52-53, 97-99, 100-102.

A third reorganization precipitated by changing business conditions occurred about one year later. In Spring

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[2] In addition to Curry, the professional members of CAPA were: Sam Hubbard (63), Phillip Dickinson (60), James Mitchell (60), Robert DiPalma (57), Malcolm Uffelman (57), William Butz (54), and Thomas Milbourne (46). Pet. App. 2a.

1994, E-Systems announced that the entire Studies and Analysis function would be disbanded. Pet. App. 3a-4a; J.A. 48.

Curry sued E-Systems, alleging that he was terminated in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"). The United States District Court for the Eastern District of Virginia granted E-Systems summary judgment on alternative grounds. Applying this Court's familiar *McDonnell Douglas* burden-shifting scheme,[3] the district court held that Curry was unable to establish a *prima facie* case of age discrimination, Pet. App. 17a, and that, in any event, he had failed to raise a genuine issue as to whether E-Systems' "proffered reason for the layoff was merely pretextual," *id.* at 19a.[4] The district court also held that Curry could not prevail under traditional proof principles, because he had failed to adduce sufficiently probative direct or indirect evidence of discrimination. *Id.* at 17a-18a.

The court of appeals affirmed. The court assumed without deciding that Curry could establish a *prima facie* case of discrimination under the *McDonnell Douglas* framework. Pet. App. 6a.[5] It also determined that

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[3] Under that scheme, the plaintiff has an initial burden of proving a *prima facie* case. A burden of production then shifts to the employer to state a legitimate, nondiscriminatory reason for the challenged employment decision. Once the employer does so, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981). *Accord McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973).

[4] Curry's assertion that the district court did not reach the pretext issue, Pet. App. 4, is plainly incorrect, as the Fourth Circuit noted, Pet. App. 4a.

[5] Because the court of appeals assumed, without deciding, that Curry had established a *prima facie* case, this case does not raise the question which this Court addressed in *O'Connor* v. *Consolidated*

E-Systems had proffered a legitimate, nondiscriminatory reason for Curry's discharge: CAPA's functions "were being phased out as part of an economically-forced redirection of E-Systems' operations," and Curry's "specific skills were deemed by management not to be as compatible with the company's refocused operations as were those of others." *Id.* at 6a-7a, 11a.[6] Thus, the court observed, to survive summary judgment Curry would have to "present genuine issues of fact both as to whether E-Systems' proffered reason was false *and* whether the real reason was discrimination because of Curry's age." *Id.* at 8a (emphasis in original). It concluded that Curry could do neither.

The court of appeals began by addressing the fact that the two oldest professionals in CAPA, Curry and Hubbard, were selected for layoff. This fact was not entitled to significant weight, the court reasoned, because the age differential between the individuals who were terminated and those who were retained was insubstantial, and because a group of only eight employees is too small to permit any reasonable inferences concerning the employer's motive. *Id.* at 9a-11a.

Next, the court considered Curry's allegation that, when he told E-Systems' Chairman of the Board that he was laid off because the Company was no longer interested in his projects, the Chairman answered, "[t]hat's bull—,"

Coin Caterers Corp., 1996 WL 142564 (U.S. Apr. 1, 1996). Accordingly, *O'Connor* has no bearing on the petition.

[6] In the court of appeals, Curry argued that E-Systems failed to produce admissible evidence of a legitimate, nondiscriminatory reason for Curry's discharge because one of the decisionmakers, Adams, had died and deposition testimony concerning his out-of-court statements was inadmissible hearsay. Brief of Appellant at 25-27. The Court of Appeals rejected this argument, both because McClain had participated in the decision and thus testified with personal knowledge, and because Adams' statements were not offered to prove their truth or correctness. Pet. App. 7a. Curry does not renew his evidentiary argument before this Court.

and that when he told a member of the Company's Executive Board of Directors about his termination, the Director asked him his age and said, "Damn, Tom, * * * it's time to hang it up." Pet. App. 2a. These isolated comments were not probative, according to the court, because the individuals who made them were not involved in the decision to discharge Curry, and because there was no evidence that they had been told of the reason for the decision by those who did make it. *Id.* at 11a.

The court of appeals then considered and rejected as insufficient the remaining evidence that Curry offered to "draw in question the truth of E-Systems' " asserted reason for his termination. *Id.* First, although Curry claimed that CAPA's focus did not change after his discharge and that work on his projects was continued by others, the court observed that the undisputed evidence showed the contrary: much of Curry's work was canceled, only a few of his projects were carried through to their completion, and what remained of CAPA was being completely disbanded. *Id.* at 11a-12a. Second, the court reasoned, Curry's claim that he was better qualified than retained CAPA employees to perform the work of the new organization was supported by nothing but Curry's own self-serving appraisals; moreover, even if E-Systems' evaluation of his abilities was mistaken, "poor business judgment * * * of course is not actionable as employment discrimination." *Id.* at 12a-13a. And third, far from proving age bias, Curry's claim that E-Systems refused to retain him as an unpaid consultant served only to bolster the Company's contention that his work was no longer needed. *Id.* at 13a.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES NO QUESTION UNDER *ST. MARY'S HONOR CENTER* v. *HICKS*, BECAUSE THE COURT OF APPEALS' DECISION MAKES CLEAR THAT CURRY COULD NOT PREVAIL EVEN UNDER HIS OWN INTERPRETATION OF THAT CASE

Curry asks this Court to review the court of appeals' decision to resolve an alleged circuit conflict concerning the evidence a plaintiff must adduce to overcome summary judgment in an employment discrimination case. Pet. App. 5-9. Consistent with this Court's holding in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 1042 (1993), the court of appeals stated that, to survive summary judgment under the *McDonnell Douglas* framework, Curry would have to "present genuine issues of fact both as to whether E-Systems' proffered reason [for his discharge] was false *and* whether the real reason was [age] discrimination." Pet. App. 8a (emphasis in original). *See Hicks*, 509 U.S. 1042, ——, 113 S. Ct. at 2752 (plaintiff in discrimination case must prove "*both* that the [employer's] reason was false, *and* that discrimination was the real reason") (emphasis in original). Curry argues that at summary judgment, *Hicks* requires a plaintiff only to produce sufficient evidence showing the falsity of the employer's asserted reason (together with a *prima facie* case), and that proof of unlawful bias is unnecessary. Pet. App. 5-6. Curry's proposed standard is of no help to him, however, because the court of appeals' decision makes clear that he cannot satisfy it.

The court of appeals considered in detail each item of evidence that Curry offered to prove that E-Systems' asserted reason for his discharge was unworthy of credence. *See* Pet. App. 9a-13a. It determined that none of the evidence was sufficiently probative to create a genuine issue as to either of two material facts: whether "E-Systems' asserted reason was a false one," and whether "age-

discrimination was the real reason for Curry's discharge." *Id.* at 9a. Because the court of appeals concluded that Curry's evidence of falsity was inadequate, its judgment for E-Systems clearly would have been the same even had it adopted the legal standard Curry advocates.

It is well established that certiorari review is unwarranted where, as here, the issue on which review is sought is irrelevant to the outcome of the case. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 172-173 (7th ed. 1993) (citing authorities). Thus, even assuming that the alleged conflict to which Curry points were otherwise ripe for this Court's consideration,[7] it would provide no basis for granting review in this case.

II. THE COURT OF APPEALS' HIGHLY FACT-SPECIFIC DECISION WAS CORRECTLY DECIDED AND HAS NO SIGNIFICANCE BEYOND THE CONFINES OF THIS LITIGATION

Curry does not dispute the settled summary judgment standards that govern this case. Pet. App. 9a. There is no question that summary judgment should be denied only when the nonmoving party "set[s] forth specific facts showing that there is a genuine issue for trial." Fed. R.

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[7] Although it is not necessary to our argument, we note that several of the cases Curry cites, Pet. App. 9, do not demonstrate the existence of a clear circuit conflict. Two are not summary judgment cases. *See Binder* v. *Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995); *Barbour* v. *Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. dismissed*, 116 S. Ct. 1037 (1996). In *DeMarco* v. *Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), the Second Circuit simply restates the holding of *Hicks* in the context of deciding the unrelated question whether application of the ADEA to parochial schools violates the Establishment Clause. *Id.* at 170. The Third Circuit's opinion in *Sheridan* v. *E.I. duPont de Nemours & Co.*, 74 F.3d 1439 (3d Cir. 1996), follows the standard Curry advocates while sharply criticizing it, *id.* at 1448-1451, and has been vacated pending rehearing *en banc*, *see* 74 F.3d 1439, 1459, 1996 WL 135060 (3d Cir., Feb. 28, 1996).

Civ. P. 56(e). A mere scintilla of evidence in support of the nonmoving party's case will not suffice; rather, a genuine issue is raised only by evidence that would permit a reasonable jury to return a verdict in the nonmoving party's favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986).

The only issue presented here is whether the court of appeals correctly applied these well-settled standards to the particular facts adduced in the litigation. Curry claims that he raised a genuine factual issue as to whether E-Systems' stated reason for terminating his employment was false; the court of appeals concluded that he did not. As this Court held long ago, certiorari is not granted "to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

That nothing more is at issue in this case is confirmed by the court of appeals' determination that its per curiam opinion did not even warrant publication. The Fourth Circuit publishes an opinion if

> (i) It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or (ii) It involves a legal issue of continuing public interest; or (iii) It criticizes existing law; or (iv) It contains a historical review of a legal rule that is not duplicative; or (v) It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit. [Fourth Circuit Internal Operating Procedure 36.4.]

Because the opinion below is unpublished, it has no precedential weight. *Id.* 36.6. The Fourth Circuit's disposition of the case, as that court recognized, is of moment only to the particular litigants before it. It presents no issues of broader significance justifying expenditure of this Court's limited resources on certiorari.

In any event, the court of appeals' decision is clearly correct. Before this Court, Curry chiefly relies on the two

alleged comments by members of E-Systems' management as proof that the Company's stated reason for its decision was untrue. Pet. App. 6. As the court of appeals concluded, however, these comments (even assuming they were made) are irrelevant to the issue of E-Systems' motive, because it is undisputed that the speakers played no role whatsoever in the decision to terminate Curry's employment, and there was no evidence that either had spoken to Adams or McClain about the basis for the decision. Pet. App. 11a. *See, e.g., Rush* v. *McDonald's Corp.*, 966 F.2d 1104, 1116 (7th Cir. 1992) (remarks by nondecisionmakers "not probative of discrimination"); *EEOC* v. *Clay Printing Co.*, 955 F.2d 936, 942-943 (4th Cir. 1992) (plaintiff must establish "nexus" between alleged statements and adverse employment decision). *See also Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in judgment) ("statements by nondecisionmakers" are not direct evidence of discriminatory motive). Thus, far from constituting "direct evidence of pretext," as Curry claims, Pet. App. 6, these isolated remarks are not at all probative of the material issues in the case.

The court of appeals also properly rejected Curry's other evidence. That the two oldest of eight professional CAPA employees were selected for layoff is not probative for two reasons: All of the employees were close in age and "well on the high-side of the normal life expectancy range," Pet. App. 10a; *see, e.g., EEOC* v. *Western Elec. Co.*, 713 F.2d 1011, 1016 (4th Cir. 1983) (no proof of discrimination where employees considered for demotion were "very close in age"), and a group of only eight employees is simply too small to permit any meaningful inference, *see, e.g., Birkbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir.), *cert. denied*, 115 S. Ct. 666 (1994); *Palmer* v. *United States*, 794 F.2d 534, 539 (9th Cir. 1986).

Curry's claims that E-Systems continued working on his projects and that CAPA's focus did not change after his

termination are not supported by the record. The latter claim, as the court of appeals observed, is belied by the undisputed fact that what remained of CAPA after the merger with GIO was being completely disbanded. Pet. App. 12a. As to the former, Curry points to only two projects, "Constellation" and "GPS," that he claims E-Systems continued, Pet. App. 7 n.9, but he conceded in his deposition that most of his time in the six months preceding his discharge was spent on projects that were not pursued. Pet. App. 12a; J.A. 55-63. Given this concession, the court of appeals correctly concluded that "the inevitable carry-through to completion of some few projects" did not cast doubt on E-Systems' explanation for Curry's discharge. Pet. App. 12a.

As the court of appeals recognized, Curry's evidence that his "marketing expertise was well-suited to the new focus [of] CAPA," Pet. App. 7, was also insufficient because it was based on his own self-serving characterization of his abilities. Pet. App. 12a. That characterization was inconsistent with Curry's admission in deposition that his work at E-Systems had always been theoretical and research-oriented. J.A. 53. And even if the Company did misjudge his skills, mistaken business judgment does not equate with either deceitfulness or intentional discrimination. *See, e.g., Gustovich* v. *AT&T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992); *Holder* v. *City of Raleigh*, 867 F.2d 823, 829 (4th Cir. 1989).

Finally, the court of appeals correctly held that E-Systems' refusal to retain Curry "as an unpaid consultant," Pet. App. 7, confirmed, rather than undermined, the Company's assertion that Curry's work was no longer needed. Because Curry failed to create any genuine issue for trial either as to the veracity of E-Systems' stated reasons for his discharge, or as to whether the decision was in reality motivated by his age, the Fourth Circuit's ruling was plainly correct and does not warrant this Court's review.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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